Supreme Court, U. S.
FILED
22 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-93

ROVIN SALES COMPANY

Petitioner

vs.

CORNELIU BOGDAN and NAPOLEON FODOR

Respondents

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals For The Seventh Circuit

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550 Hanna Building,
Cleveland, Ohio 44115,
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

ROVIN SALES COMPANY

Petitioner

vs.

CORNELIU BOGDAN and NAPOLEON FODOR

Respondents

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Seventh Circuit

The petitioner prays for a writ of certiorari to review the order of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on May 3, 1976.

OPINIONS BELOW

The District Court entered an order dismissing the respondents as defendants, and denied

the petitioner's motion to reconsider that order, or in the alternative to certify the question for appeal pursuant to 28 USC Section 1292(b). The Court of Appeals dismissed the petitioner's appeal "in accordance with the motion of defendants-appellees." No opinion was rendered by the Court of Appeals or the District Court. The order of the Court of Appeals and Memorandum Order of the District Court appear in the Appendix hereto.

JURISDICTION

The order of the Court of Appeals for the Seventh Circuit was entered on May 3, 1976. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Ambassador and a member of the diplomatic mission to the United States may be joined as defendants in a diversity suit in which their country is a defendant and subjected to United States jurisdiction in an action arising from their commercial pursuits, or is such an action against them barred by statute prohibiting suits against ministers of foreign states, 22 USC, Section

252-254?

2. Did the District Court properly surrender jurisdiction over the respondents in absence of an explicit request or assertion by the State Department for such abstention?

3. Are the answers to the foregoing questions too important to deny interlocutory review, and will the deferment of the appeal to await final judgment in the action prejudice or irreparably affect the substantial rights of the petitioner?

STATUTORY PROVISION INVOLVED

22 U.S.C., Sections 252-254, appear in the Appendix.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked because of the diversity of citizenship, the petitioner being an Ohio corporation, and the defendants and respondents entities and citizens of Romania.

The petitioner, at all times relevant hereto, had its office and principal place of business in Cleveland, Ohio. On June 15, 1973, petitioner filed a complaint against Vinexport, a State company for foreign trade of Romania, in the United States District

Court for the Northern District of Illinois, Eastern Division. The service of process on the Economic Counselor and head of the Romanian Commercial Office in Chicago, Illinois, was quashed and the action was ordered dismissed by the District Court. As a result thereof, the complaint was amended and the action was filed against the Socialist Republic of Romania, its Ministry of Foreign Trade, the Ambassador to the United States and the Economic Counselor to the diplomatic mission to the United States, namely, Corneliu Bogdan and Napoleon Fodor, respectively, respondents herein, and other individual agents and representatives of that State. The defendants filed a motion to dismiss the amended-complaint for lack of subject matter jurisdiction and/or to quash service of summons upon the defendants. The District Court rejected the argument that the Socialist Republic of Romania, and its several agencies and agents are immune from United States

jurisdiction on the ground of sovereign immunity. It reaffirmed its earlier ruling that "where a foreign sovereign engages in commercial as opposed to political or governmental activities, it is not immune from suit", citing Victory Transports, Inc. v. Comisaria General, 336 F.2d 354 (2d Cir., 1964), and that the defendants are amenable to suit in the district.

On September 23, 1975, the defendants were ordered to answer the petitioner's amended-complaint by October 27, 1975. Subsequently, two extensions of time to answer were granted to the defendants to November 27, 1975. Thereafter, the defendants, other than Vinexport and Vasile Lapadatu, again requested, and the court granted, another leave to plead on November 28, 1975, for a period of 30 days. During this period, and specifically on December 4, 1975, the Department of State addressed a letter to the District Judge wherein it forwarded two certi-

fications of immunity status relating to the respondents, Corneliu Bogdan and Napoleon Fodor, and whereby the court was informed that the said individuals enjoy "full diplomatic immunity from judicial process". These individuals then filed another motion with the court on December 11, 1975, wherein they sought dismissal as defendants in the action. The motions of Corneliu Bogdan and Napoleon Fodor were granted and the action against them was dismissed on January 21, 1976. The petitioner's request for reconsideration of the dismissal order, or in the alternative to certify the question for appeal pursuant to 28 U.S.C., 1292(b) was denied.

An appeal of the District Court's action was taken to the Court of Appeals. The respondents moved for a dismissal of the appeal on two grounds. (1) The respondents, as diplomatic representatives of a foreign mission to the United States, are immune from suit in the courts of the United States, and (2) the

orders in question are not appealable orders. The Court of Appeals dismissed the appeal "in accordance with the motion of the defendants-appellees,".

Petitioner was organized in 1968 specifically to help the country of Romania to promote the sale of its wines and other alcoholic beverages in the United States. Inasmuch as the wines of Romania were never sold in the United States, petitioner undertook a marketing study to determine the practicability of selling the wines in the United States; and, thereafter, it engaged in diverse and sundry promotional efforts and activities throughout our country. In 1972, after four years of persistent efforts and vigorous activities, the petitioner, Rovin Sales Company (hereinafter called Rovin) succeeded in establishing a market for the wines in the following states: Arizona, California, Georgia, Illinois, Maryland, Michigan, New York, Nevada, Ohio, Oregon, Texas,

and in Washington, D.C. Chicago and its environs became the second largest market for the sale of Romanian wines. Petitioner's persistent activities led to substantial commitments for the purchase of the wines in Illinois and other states for 1973.

From its inception and throughout the years of its activities, Rovin was in frequent and regular contact with the appropriate Romanian officials and authorities concerning its efforts and programs on behalf of the wines. Everything which was done and pursued by Rovin to promote and sell the wines was with the knowledge and approval of these officials. Rovin carried out its activities as the sole agent in the United States for the wines of Romania. During the year 1971, the respondent, Corneliu Bogdan, and other commercial representatives of Romania initiated and carried out a program to meet with and to familiarize American business and commercial interests in the United States

with the liberal opportunities and the realistic possibilities of serious trade with Romania created by the newly enacted Foreign Trade Law of Romania. As a consequence thereof, respondent Bogdan and his associates arranged for and participated at a meeting which was sponsored by the "Chicago Association of Commerce and Industry" on June 23, 1971 in Chicago, Illinois, and attended by various representatives of industries in that area. The meeting was entitled "EAST-WEST TRADE AND INVESTMENT" and had as its purpose "To discuss joint venture possibilities in Romania and to increase trade between Romania and Chicago businesses." Similar meetings were planned and held that same year in Atlanta, Georgia and Boston, Massachusetts. Rovin participated at these meetings on behalf of the wines of Romania at the request of the respondent, Corneliu Bogdan.

Romania is a socialist state governed by the Communist party of that country.

Foreign trade is a monopoly of the country of Romania. The defendant Vinexport is a creature of the Romanian government as a State Company or Enterprise for Foreign Trade, and is entrusted with the export of the wines and alcoholic beverages of that country. The respondent, Napoleon Fodor, as Economic Counselor to the Romanian diplomatic mission to the United States, was appointed to that position by the Romanian government. Respondent Corneliu Bogdan is, and was at all times relevant hereto, the Ambassador of Romania to the United States. In accordance with the law of Romania, he acts in dual capacity - he is the head of the diplomatic mission, and he is also responsible for the commercial activities of Romania in the United States. Article 51 of the Foreign Trade Law of Romania provides that all the trade activities of a State Company for Foreign Trade, such as defendant Vinexport, and of the commercial offices and missions abroad,

such as is headed by the respondent, Napoleon Fodor, shall function ". . . under the guidance and control of the chief of the diplomatic mission", respondent Corneliu Bogdan.

In 1972, the exact dates or times being unknown to Rovin, the respondent, Corneliu Bogdan and Napoleon Fodor, along with others not now known, planned and arranged to exclude Rovin from the wine markets which it developed and established in the United States and to destroy its business of selling the wines of Romania in the United States in accordance with a pre-conceived plan. As a consequence of the misrepresentations and clandestine activities on the part of the respondent, Corneliu Bogdan and Napoleon Fodor, the wine authorities of Romania granted the exclusive right to sell all alcoholic beverages of that country in the United States for 1973 to a company created expressly for such a purpose, and known as Beverage Importation

Corporation of League City, Texas. The acts and conduct of the respondents and others unknown now, in pursuit of such a plan, directly caused the ruin and destruction of the petitioner's business.

REASONS FOR GRANTING THE WRIT

1. The decision of the District Court, which the Court of Appeals refused to review, raises significant and recurring problems concerning suits against diplomatic representatives engaged in commercial pursuits.

The rights of American citizens who were tortiously damaged by acts committed within the United States by agents of a foreign government are involved herein. A determination by this court of the important and recurring question of diplomatic immunity to conform to the United States policy with regard to the res-

trictive immunity accorded to foreign governments engaged in commerce, will assure redress to persons wronged by a representative of a foreign sovereign in pursuit of his country's commercial activities in the United States.

The cause of action that is the subject of this appeal seeks damages for wrongful and malicious actions and conduct on the part of the respondents and others which directly caused the ruin and destruction of the petitioner's business.

The dismissal of the respondents as defendants was premised upon the certifications of the State Department that such parties are entitled to diplomatic immunity from suit by reason of "domestic law, 22 U.S.C., Sections 252-254", and "under the provisions of the Vienna Convention on Diplomatic Relations of 1961 (TIAS 7502)." The letter of the Department of State to the court which accompanied the certifications stated that ". . .

"the enclosed certifications are intended to inform the court of the diplomatic immunity status of Ambassador Bogdan and Mr. Fodor and for no other purpose relating to the pending action. . . " (underscoring supplied)

The question whether the respondents should be dismissed in the instant action was not considered by the Department of State, and, properly so. There is not even a "suggestion" of immunity by the Department in the pending case. The documents merely inform the court that the defendants enjoy diplomatic immunity from judicial process. Assuredly, the State Department was fully informed about the nature of the action against the defendants. If the purpose of the doctrine of diplomatic immunity would be served in our situation, the State Department would have, at least, suggested that the respondents be exempted from the present suit. It appears, however, that it is not the general policy of the State Department to make a decision

regarding immunity from suit on behalf of a foreign diplomatic representative in an action in which the facts do not call for such intervention. In the light of what the State Department does when it believes that immunity should be granted, namely "recognizing and allowing" the claim of immunity, the certification with the accompanying comment that it is "intended to inform the court of the diplomatic immunity status of (the parties) and for no other purpose relating to the pending action", should be regarded as merely the diplomatic way of saying no. It seems more likely that the State Department, in framing its letter, was indicating the view that the case might well be tried in court. The refusal or failure of the State Department to request immunity must be interpreted to represent a case of adherence to its new policy of discouraging immunity in cases involving commercial activities.

The District Judge construed the certi-

fications of the State Department as granting immunity to the respondents, Is it proper exercise of the judicial function of a court to dismiss on the ground of immunity when the State Department does not suggest immunity? Most commentators and legal scholars agree that immunity must somehow be curbed rather than extended, in keeping with the trend toward achievement of the "rule of law". The author of "The Use of International Law", 83 (1959), professor Jessup, at note 7, says:

> "(A)n abundant jurisprudence in many countries, as well as the position of the State Department itself, attests the validity of the conclusion that the granting or withholding of immunity is a legal question."

In National City Bank of New York v. Republic of China, 348 U.S. 356,359, this Court stated:

> ". . . the privileged position of a foreign State is not an explicit command of the Constitution. It rests on considerations of policy given legal sanction by this Court."

Mr. Justice Frankfurter expressed the view in Mexico v. Hoffman, 324 U.S. 30 (1945) that

the courts should not surrender jurisdiction unless the State Department or Congress explicitly asserts the necessity of abstention. In an opinion joined in by Mr. Justice Black, Mr. Justice Frankfurter stated, at pages 41-45:

> ". . . unless constrained by the established policy of our State Department, courts will best discharge their responsibility by enforcement of the regular judicial process."

In the instant situation, the Department of State, in its letter to the District Judge, did not deny or suggest that immunity be granted the respondents. Consequently, we believe, the reasonable approach to the problem is that the State Department is taking no position in the matter. Thus, the court was free to determine for itself the question of immunity. Authoritative writers are of the opinion that members of a diplomatic mission, such as our parties, do not enjoy independence in the sense of an exemption from all obligations toward the local law. Immunity

does not give an ambassador a license to commit wrongs deliberately against a national of the host country. He is entitled to immunity only so long as he properly discharges the diplomatic function of his office. It is universally accepted that the right to immunity is based on the exercise of diplomatic functions. The diplomatic function is the transaction of business between the government which sent the representative and that to which he is accredited. Montell Ogdon, professor of Public Law and Jurisprudence, Columbia University, explored the problem exhaustively in his book entitled "Juridical Bases of Diplomatic Immunity", (Washington: Byrne, 1936). In referring to the authoritative work of Sir Cecil J.B. Hurst, legal adviser to the British Foreign Office - "Diplomatic Immunities - Modern Developments", 10 British Yearbook of International Law, 1929, 1, professor Ogdon writes at pp 190, 191:

> "What then, according to these cases, is the purpose for which these immunities are recognized? It is to enable the members of a foreign mission to act effectively as the representatives of their sovereign in the maintenance of relations with the sovereign to whom they are accredited, said Sir Cecil. It is not to enable them to fulfill tasks lying outside of diplomatic activities. This test if applied to the member of a diplomatic mission or to any person claiming immunity should determine whether there is an obligation to allow the privilege." (underscoring ours)

Sir Cecil J.B. Hurst expressed the principle as follows:

> "If the representative is called upon by his own sovereign to perform functions other than those of maintaining relations with the sovereign to whom he is accredited, the purpose with which the latter acquiesces in his non-subjection to the local jurisdiction ceases to be operative in respect of those functions. The extraterritoriality or non-subjection to the local jurisdiction enjoyed by a member of a foreign diplomatic mission is, therefore, due not to the fact that he is engaged on the business of a foreign Government, but to the fact that he is a part of the machine for maintaining relations between two Governments." (underscoring ours)

And, Ogdon recites fuether:

> "In Barbuit case (1735), the question was whether the defendant, commissioned as an agent of commerce by the King of Prussia, should enjoy immunity. The Lord

> "Chancellor proceeded upon the theory that the functions performed by the agent, and not the mere existence of credentials issued by a foreign sovereign, should be the test whether a particular person should be privileged. He found that Barbuit was not 'intrusted to transact affairs between the two crowns' but only to assist his Prussian Majesty's subjects in their commerce. It was held, therefore, that he was not entitled to diplomatic immunity." (underscoring ours)

The propriety of joining a diplomatic agent, such as has been done in our case, was exhaustively considered and ruled upon by an Italian court in 1952. In an action before the Tribunal of Rome, brought by an Italian national against the Republic of Yugoslavia for money had and received, the Court, upon defendant's not appearing, inquired into its jurisdiction of its own motion. Considering that service of process was properly effected and that the transaction in issue was of a private law character, the Court determined that it had jurisdiction over the matter. Relative to our issue, the Court stated:

> "It has always been accepted that a diplomatic agent 'represents his state vis-a-vis the Government of the State to which

> "he is accredited, that he has charge of the public and private interests of his State, and that he may protect the rights of nationals of the latter State. But writers have not considered to any great extent the capacity of such an agent to represent his State or the Government thereof, in transactions of a private law character, or to represent the latter in proceedings in which it becomes involved as a result of such transactions. In the view of the Court, however, to hold that a diplomatic agent has this capacity would imply nothing incompatible with the nature of the diplomatic office. Indeed, as has been seen, the functions of diplomatic agents are of wide scope and are not circumscribed by any rule of international law. Such an agent is the official representative of one State within the territory of another. There is nothing improper in, nor is there any rule of international law to forbid, the extension of the functions of such an agent beyond the sphere of political or public activity - especially at the present day, when private law activities of States are extensive and diverse and when the majority of writers reject the former theory, based on the distinction between acts jure imperii and acts jure gestionis, . . . Applying this indisputable principle here, it must be concluded that if the rules as to diplomatic immunities do not debar a diplomatic agent from acting as an organ of his State even in a matter of a private law character, they do not, either, prevent his being joined as a defendant in proceedings arising out of a matter of a private law character in which that State is involved. Such an agent may be so

"joined if the receiving State is entitled to take jurisdiction over a foreign State and its organs in the matter in issue . . . . The Court's view of the matter is borne out by custom which is, of course, the largest source of international legal rules . . . ." (underscoring supplied)

Castiglioni c. Federal Peoples Republic of Yugoslavia, 19 Int'l L. Rep. 203,210 (No. 43).
See also, 6 Digest of International Law, Whiteman, (1968), pp 687,688.

The allegations of the amended-complaint, which are to be taken as true for the purpose herein and, additionally, the unchallenged factual statements in the record, establish that the activities and conduct for which the defendants are called to respond, are not of a diplomatic character, but purely and clearly extrinsic to the diplomatic functions for which they were accredited to our government. The purposes for which immunity is recognized, as stated by Montell Ogdon, are to enable Ambassador Bogdan and Mr. Fodor, as members of Romania's "diplomatic mission" to the Government of the United States, ". . .to

"act effectively as the representative of their own sovereign in the maintenance of relations with the sovereign to whom they are accredited. It is not to enable them to fulfill tasks lying outside of diplomatic activities." This is the test, Ogdon stated, to be applied to the member of a diplomatic mission in determining whether there is an obligation to apply the privilege of immunity. In charging the respondents with liability in our case, we have not trespassed into the sanctity of the diplomatic mission of the parties, nor have we interfered in any way with the proper performance of their diplomatic functions. The respondents themselves left the protective domain and privileged position of the diplomatic world to engage in activities totally extrinsic to the mission for which they were accredited by our government.

2. The Refusal Of The Court of Appeals To Review The District Court's Order Dismissing The Respondent's As Defendants In The Action Is Contrary To The Rule Enunciated In Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (L949), and Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964).

We set forth the facts and arguments in a more exhaustive manner to show how they relate to the question of finality and to elucidate upon the importance of review at this stage of the proceedings.

In Cohen the court declared with reference to the question of appealability of an interlocutory order as follows:

> "It is obvious that if Congress had allowed appeals only from those final judgments which terminate an action this order would not be appealable. The effect of the statute (28U.S.C. Sec., 1291) is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power to review, not intervene. So long as the matter remains open, unfinished or inconclusive there may be no intrusion by appeal.

> But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken".

The same reasoning, as stated in Cohen, is applicable to our situation. The District Court's order dismissing the respondents as defendants "was concluded and closed and its decision final in that sense before the appeal was taken". The order on appeal is wholly collateral to the merits, and, its effect is to prevent the petitioner from proceeding against the "principal wrongdoers" in the action, thereby affecting the petitioner's substantive rights in a decisive, practical sense. So long as the decision affects the basic right to litigate, or finally determines a claim separable from and independent of the substantive issues so that a later review of it when an appeal is taken from the final judgment on the merits becomes an empty gesture, the Cohen test is met. The order of the District Court is too

important to deny interlocutory review. It cannot await the ultimate final judgment as the petitioner's rights against the respondents may be lost irreparably through the delay. The time is ripe for review of the issue of diplomatic immunity as it relates to commercial pursuits in view of the increasing practice by foreign governments of engaging in commercial activities through state trading companies.

The petitioner is entitled to its day in court, and to a hearing on the merits of its claim against the respondents. The injustice of allowing judicial immunity in this case is particularly apparent. The petitioner's business has been tortiously ruined and destroyed by the respondents, and, yet it is prevented from seeking judicial redress in our courts for wrongs committed in the United States. The refusal to

hear the petitioner's complaint against the respondents is permanent unless the order below is nullified by this court. It is only by a proper definition of the immunity to be accorded to the diplomatic representatives, and a proper circumspection of the effect to be given to Sections 252 - 254 that the American people can be assured that the hospitality accorded to diplomats on our soil will not be abused by conduct on the part of those privileged in a manner that is inimical to the American concept of fair play. Such immunity should be available only when it is truly necessary to assure the proper exercise of the diplomatic function- a circumstance that could be readily brought about if the granting of immunity were restricted to those cases where our State Department certified that the exemption from suit was in

the public interest.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the order below.

Respectfully submitted,

John R. Vintilla

Attorney for Petitioner

Appendix A

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted: April 29, 1976
May 3, 1976

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

ROVIN SALES COMPANY, CLEVELAND OHIO,
Plaintiff-Appellant,

No. 76-1303 vs.

CORNELIU BOGDAN and NAPOLEON FODOR
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73-C-1550

This matter comes before the court on the "MOTION TO DISMISS AND SUGGESTIONS IN SUPPORT THEREOF" filed herein on April 22, 1976 by counsel for the defendants-appellees. On April 28, 1976 counsel for the plaintiff-appellant filed herein his "APPELLANT'S RESPONSE TO MOTION TO DISMISS," which document indicated that the complete answer to the arguments made in the defendants-appellees' motion to dismiss is included in the "BRIEF OF APPELLANT WITH APPENDIX," previously filed herein on March 30, 1976. Upon consideration whereof, this court having thoroughly reviewed the aforesaid documents,

IT IS ORDERED that this appeal from a decision of the United States District Court for the Northern District of Illinois, Eastern Division be, and the same is hereby, DISMISSED in accordance with the motion of the defendants-appellees.

FPI 80—8-25-71-250M 0721

Appendix B

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROVIN SALES COMPANY,
Cleveland, Ohio,

Plaintiff,

v.

THE SOCIALIST REPUBLIC OF
ROMANIA, a foreign state,
et al.,

Defendants.

JANUARY 19, 1976

No. 73 C 1550

MARSHALL, J.

MEMORANDUM ORDER

The Department of State has certified to the diplomatic immunity from suit of defendants, His Excellency Corneliu Bogdan, Ambassador of Romania to the United States, and Napoleon Fodor, Economic Counselor of Romania, and they have moved that the action be dismissed as to them on those grounds. We have considered the papers submitted by the parties pro and con the motion and have concluded that the motion should be sustained. 22 U.S.C. §§252-254; Arcaya v. Paez, 145 F.Supp. 464 (S.D.N.Y. 1956), aff'd 244 F.2d 958 (2d Cir. 1957); Mongillo v. Vogel, 84 F.Supp. 1007 (E.D.Pa. 1949); Carrera v. Carrera, 174 F.2d 496 (D.C.Cir. 1949). Accordingly, the action is dismissed as to defendants Bogdan and Fodor.

All defendants have now filed their answers raising a number of affirmative defenses which, on their faces, appear meritorious.

Appendix C

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable PRENTICE H. MARSHALL

Cause No. 73 C 1550 Date Jan. 30, 1976

Title of Cause Rovin Sales Co. v. The Socialist Republic of Romania

Brief Statement of Motion Order

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

FEB 2 1976

Reserve space below for notations by minute clerk

Plaintiff's motion for reconsideration of the order of January 19, 1976 dismissing defendants Bogdan and Fedor or in the alternative, to certify the question for appeal is denied.

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

APPENDIX

DEPARTMENT OF STATE

Washington, D.C. 20520

December 4, 1975

Honorable Prentice H. Marshall
U.S. District Court
219 South Dearborn Street
Chicago, IL 60604

Re: Rovin Sales Company v. Vinexport, Civil Action 73 C 1550

Dear Judge Marshall:

As I promised your secretary on November 25, I am forwarding two certifications of immunity status relating to defendants in the above-mentioned case. These defendants are His Excellency Corneliu Bogdan, Ambassador of Romania to the United States, and Napoleon Fodor, Economic Counselor of Romania. Each of these persons is entitled to diplomatic immunity under both U.S. domestic law, 22 U.S.C. sections 252 - 254 and under the provisions of the Vienna Convention on Diplomatic Relations of 1961 (TIAS 7502), which is in force between the U.S. and Romania. Both Ambassador Bogdan and Mr. Fodor have been properly accredited as diplomatic Representatives of the Socialist Federal Republic of Romania to the United States.

The enclosed certifications are intended to inform the court of the diplomatic immunity status of Ambassador Bogdan and Mr. Fodor and for no other purpose relating to the pending action. If the court has any further questions on this issue, please feel free to communicate them to me.

Sincerely,

Horace F. Shamwell, Jr.

Horace F. Shamwell, Jr.
Deputy Assistant Legal
Adviser for Management

cc: Embassy of Romania
Mr. Eugene Resnick
Attorney for the Government of Romania

Enclosures:
as stated

Appendix E

22 U.S.C. SS252-254 read as follows:

"S252. Suits against ministers and their domestics prohibited.

Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any ambassador or public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void. R.S. S4063."

"S253. Penalty for wrongful suit.

Whenever any writ or process is sued out in violation of section 252 of this title, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the laws of nations and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the court. R.S. S4064."

"S254. Exceptions as to suits against servants, etc., of minister; listing servants.

Sections 252 and 253 of this title shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of an ambassador or a public minister, and the process is

"founded upon a debt contracted before he entered upon such service; nor shall section 253 of this title apply to any case where the person against whom the process is issued is a domestic servant of an ambassador or a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who shall upon receipt thereof post the same in some public place in his office. All persons shall have resort to the list of names so posted in the marshal's office, and may take copies without fee. R.S. SS4065, 4066."

Appendix F

FOREIGN TRADE LAW OF ROMANIA
Exhibit I attached to Plaintiff's Motion
Under Rule 12.

Art. 2. In the Socialist Republic of Romania foreign trade is the MONOPOLY of the State and is carried out in accordance with these laws.

Art. 4. The general management of foreign economic relations of the Socialist Republic of Romania is performed by the Council of Ministers.

Art. 5. The Ministry of Foreign Trade assures the fulfillment of the policies of the Party and State in the field of foreign trade and international economic-technical participation.

Art. 21. Foreign Trade activities shall be organized in accordance with the needs of the social development of the Socialist Republic of Romania. The Council of Ministers determines the concrete manner of organizing these activities as well as the economic units which are entitled to directly effectuate foreign trade operations.

Art. 51. The commercial sections of the diplomatic missions, commercial agencies and offices abroad coordinate the activities of all permanent or temporary representatives of industrial units, central units, State companies for foreign trade, commercial missions and shall function in close unity with and under the guidance and control of the chief of the diplomatic mission.

Supreme Court, U. S.
FILED
SEP 3 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-93

ROVIN SALES COMPANY,

Petitioner,

vs.

CORNELIU BOGDAN AND NAPOLEON FODOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-93.

ROVIN SALES COMPANY,

Petitioner,

vs.

CORNELIU BOGDAN AND NAPOLEON FODOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The only opinion in this matter is the Memorandum Opinion of the District Court which is reported in *403 F. Supp. 1298* and although not directed to the matters covered by the Order which the Petition for Writ of Certiorari seeks to have reviewed gives what Respondents feel is an interesting background and is therefore included in the Appendix A hereto.

JURISDICTION.

The jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED.

1. Whether persons certified by the United States Department of State as enjoying "full diplomatic immunity from judicial process under the provisions of Sections 252-254 of Title 22 of the United States Code" are entitled to the immunity granted by those Sections; or whether the Court of Appeals should ignore the clear provisions of the statute at the request of the Petitioner.

2. Whether the Order entered by the District Court on January 30, 1976 denying Petitioner's Motion to reconsider the dismissal from the action of the two Respondents because of their diplomatic immunity and refusing to certify the question for appeal was an appealable order.

STATUTES INVOLVED.

The statutes involved are cited and reproduced in the Petition.

STATEMENT OF THE CASE.

The Petitioner is a corporation organized with minimum capital,[1] which has never had any directors,[2] or even a corporate seal,[3] and has been run as a "sole proprietorship" by its attorney,[4] who admitted in deposition that he had devoted his full time to the practice of law.[5] Except at relatively brief intervals when the corporation may have had as many as three other

1. Deposition of John R. Vintilla taken June 29, 1976, as filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, at page 40.
2. *Ibid.*, p. 39.
3. *Ibid.*, p. 7.
4. *Ibid.*, p. 39.
5. *Ibid.*, p. 63.

employees at one time,[6] the Petitioner has had no other employees.[7]

The Amended Complaint alleges tortious acts by the Respondents and breach of contract and tortious acts on the part of the Socialist Republic of Romania and certain of its agencies and individual representatives.

The claim of diplomatic immunity on behalf of the Respondents herein was upheld by the Court and the Respondents dismissed from the action on the basis of the certification of the United States Department of State that the two Respondents are, and have been for many years, respectively the duly appointed Ambassador Extraordinary and Minister Plenipotentiary and Economic Counselor to the Diplomatic Mission from the Socialist Republic of Romania to the United States, and in said capacity each enjoys "full diplomatic immunity from judicial process under the provisions of Sections 252-254 of Title 22 of the United States Code".

ARGUMENT.

I. Whether or Not Respondents Engaged in Commercial Pursuits as Alleged and Argued by the Petitioner Is Completely Immaterial.

The Respondents are charged with tortious conduct and whether that tort occurred in the course of conducting a commercial pursuit or in the course of a personal transaction or in any other context is completely immaterial.

The law is clear that an Ambassador or public minister of any foreign state authorized and received as such by the President of the United States is immune from service of process without regard to the basis of the suit. This immunity is personal to the Ambassador or Minister and when the claim

6. *Ibid.*, pp. 39, 66, 68, 70.
7. *Ibid.*, p. 113.

is timely and properly made, the sole question is whether or not the person claiming the immunity has, in fact, been authorized and received as such by the President of the United States.

In this case, the Certificates of the United States Department of State to that effect (Appendix B) are conclusive of the fact, which indeed is not disputed by the Petitioner.

Petitioner's oblique contentions (pages 14 and 15 of its Petition) that the State Department by the letter accompanying its certificate, as to the diplomatic immunity status of these Respondents was suggesting to the trial court that immunity from suit should be denied is a libel on the State Department and should be vigorously rejected. Diplomatic immunity when granted is binding upon the court without reference to the merits of the controversy. *Arcaya* v. *Paez,* 145 F. Supp. 464 (1956) *aff'd* 244 F. 2d 958 (2nd Cir. 1957); *Mongillo* v. *Vogel,* 84 F. Supp. 1007 (E. D. Pa. 1949); *Carrera* v. *Carrera,* 174 F. 2d 496 (D. C. Cir. 1949); *Vienna Convention on Diplomatic Relations, signed at Vienna, April 18, 1961.*

As the United States District Court for the Southern District of New York stated in *Arcaya* v. *Paez,* 145 F. Supp. 464 (1956), *aff'd* 244 F. 2d 958 (2nd Cir. 1957):

> "An ambassador or minister is, however, absolutely immune from suit even though it be based upon personal transactions. Magdalena Steam Navigation Company v. Martin, 2 El. § El. 94.
>
> [3] The court must, of course, determine its own jurisdiction without reference to the views of the Department of State. The questions of the diplomatic status enjoyed by a given defendant and the immunity to be accorded him are, however, questions where a determination of the Department of State is binding upon the court. United States of Mexico v. Schmuck, 293 N. Y. 264, 56 N. E. 2d 577."

In *Mongillo* v. *Vogel,* 84 F. Supp. 1007 (E. D. Pa. 1949), the Court, citing *22 U. S. C. A., §§ 252-254* in support of its

action, quashed service of summons on a defendant who at the time of an automobile accident was entitled to diplomatic immunity.

In *Carrera* v. *Carrera,* 174 F. 2d 496 (D. C. Cir. 1949), the United States Court of Appeals for the District of Columbia said at page 497:

> "It is enough that an ambassador has requested immunity, that the State Department has recognized that the person for whom it was requested is entitled to it, and that the Department's recognition has been communicated to the court. *'The courts are disposed to accept as conclusive of the fact of the diplomatic status of an individual claiming an exemption, the views thereon of the political department of their government.'* "[9]

It is clear that the Petitioner has confused sovereign immunity with diplomatic immunity. In the case below, the District Court, rightly or wrongly, has held that since the Defendant, the Socialist Republic of Romania, was allegedly engaged in trade or commerce and therefore refused to dismiss it on the grounds of sovereign immunity. Obviously, this is totally unrelated to the claim for and proper allowance of the diplomatic immunity which Respondents enjoy.

Even though in some extreme cases which can be imagined, such as violation of criminal laws, the doctrine of diplomatic immunity may seem repugnant. However, the reasons for it are necessarily compelling. It protects each country's diplomatic representatives from harassment and is an ancient doctrine, well founded in the laws of all civilized communities and in the Vienna Convention and is specifically made part of the statutory law of the United States of America. Any attempt to change it must be addressed to the Congress of the United States and not to a court.

The attempt of the Petitioner to read into the letter of transmittal of the Certificates what is not shown by the Certificates of the United States Department of State (Appendix B), is

misleading and should be rejected. All of the authorities cited by the Petitioner are cases dealing with claimed sovereign immunity, and have nothing to do with diplomatic immunity.

II. The District Court's Order Dismissing the Respondents as Defendants in the Action Was Not an Appealable Order and Accordingly the Refusal of the Court of Appeals to Review the Same Was Correct.

By relying upon the rule enunciated in *Cohen* v. *Beneficial*, 337 U. S. 531 (1949), and *Gillispie* v. *U. S. Steel Corp.*, 379 U. S. 148 (1964), Petitioner admits the District Court's Order was not a final order.

The orders appealed from do not fall within the conditions required for the application of the *Cohen Rule*. The orders appealed from do not make any final determination of a claim of right separately from and collateral to rights asserted in this action as required by the *Cohen Rule*. The orders granting full diplomatic immunity and dismissing the actions as to two of the Defendants will continue the action without prejudice against the sovereign state of Romania and the remaining Defendants. The granting of diplomatic immunity will not affect the merits of the controversy against the remaining defendants. Nor will it bar an action against the defendants after their diplomatic immunity shall have expired.

The questioned orders are not of sufficient importance to require review. They represent no serious or unsettled questions as required for review under the *Cohen Rule*. The trial court found in the orders of dismissal as to the Defendants Bogdan and Fodor that "all defendants have now filed their answers raising a number of affirmative questions which on their face appear meritorious".

The *Cohen Rule* is explored and dissected in *9 Moores Federal Practice*, § 110.10. The author, at page 133, states:

> "On the face of it, the Cohen rule appears to require three characteristics of an order before it can qualify as a 'final decision': (1) the order must be a final determination of a claim of right 'separable from, and collateral to', rights asserted in the action; (2) it must be 'too important to be denied review', in the sense that it 'presents a serious and unsettled question'; and (3) its review cannot, in the nature of the question that it presents, await final judgment because 'when that time comes, it will be too late effectively to review the . . . order and rights conferred . . . will have been lost, probably irreparably.' "

It is clear that the appeal before this Court does not qualify as a "final decision" as it does not contain any of the above qualifications. The *Cohen Rule* is also reviewed in the case of *Weingartner* v. *Union Oil Company of California*, 431 F. 2d 26 (1970). In that case, the court said at page 29:

> "[3] The Cohen approach rests upon either of two underpinnings: the 'collateral order' rule, e.g. Frank, Requiem for the Final Judgment Rule, 45 Tax.L.Rev. 292, 300-302 (1966); or the likelihood of 'irreparable harm' to a party if immediate review is not allowed, e.g. Note, Appealability in the Federal Courts, 75 Harv.L.Rev. 351, 364 (1961); see also Forgay v. Conrad, 47 U.S. 201, 6 How. 201, 12 L.Ed. 404 (1848). Under neither premise does Cohen render the order before us appealable. The district court's dismissal of the class claim did not deal with rights collateral to the merits of the lawsuit. Rather it struck one of the two counts from the complaint entirely and had the effect of blocking that claim from this lawsuit. Nor will denial of review of that order at this stage create an irreparable hardship for plaintiffs, as we develop more fully in the discussion which follows."

See also *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F. 2d 295 (1969).

CONCLUSION.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: ....., 1976.

APPENDIX A.

403 FEDERAL SUPPLEMENT.

UNITED STATES DISTRICT COURT,
N. D. Illinois, E. D.
September 15, 1975.

ROVIN SALES COMPANY, Cleveland, Ohio,
Plaintiff,

vs.

THE SOCIALIST REPUBLIC OF ROMANIA, a Foreign State, et al.,
Defendants.

No. 73 C 1550.

Wine distributor brought action against foreign country, its agents and agencies seeking damages arising out of alleged breach of wine distributorship agreement and failure to deliver wines. On motion to quash service of summons and dismiss the action, the District Court, Marshall, J., held that foreign country which engaged in commercial activities was not immune from suit on its contracts; that defendants were amenable to suit under Illinois long-arm statute as to claim for damages arising out of tortious conduct committed in Illinois but were not amenable to suit in district as to claim arising out of the failure to deliver wines to Ohio and Arizona.

Motions granted in part and denied in part.

1. International Law 10.43.

Pleading requirements of Illinois Civil Practice Act that pleader allege substantial averments of fact necessary to state cause of action either at law or in equity were not applicable

as to action brought in Illinois district against foreign country, its agents and agencies under Illinois long-arm statute merely because federal rule embraced methods and circumstances under which extraterritorial service of process could be effected in Illinois. Fed. Rules Civ. Proc. rules 4(e), 8(a), 28 U. S. C. A.; S. H. A. Ill. ch. 110, §§ 16, 17, 31.

2. Federal Civil Procedure 621.

Federal court must apply federal standards of pleading. Fed. Rules Civ. Proc. rule 8(a), 28 U. S. C. A.

3. Federal Civil Procedure 1832.

Inquiry on motion to dismiss action brought in Illinois district against foreign country, its agents and agencies under Illinois long-arm statute was not whether plaintiff pleaded cause of action which arose in part from conduct performed by defendants in Illinois but whether, under amended complaint, plaintiff would be permitted to prove a set of facts in support of its claim which would entitle it to relief and whether that set of facts could be said to involve, in material part, performance of facts by defendants in Illinois. Fed. Rules Civ. Proc. rules 4(e), 8(a), 28 U. S. C. A.; S. H. A. Ill. ch. 110, §§ 16, 17, 31.

4. International Law 10.33.

Foreign sovereign engaged in commercial as opposed to political or governmental activities was not immune from suit on its contracts.

5. Courts 12(2).

Illinois long-arm statute was intended to extend jurisdiction to maximum reach permissible under due process of law. S. H. A. Ill. ch. 110, §§ 16, 17.

6. Constitutional Law 305(4).

Due process requires that a defendant have minimal contacts with the forum in which jurisdiction is asserted.

7. Courts 12(2).

For purposes of Illinois long-arm statute, a defendant is deemed to commit a tortious act in Illinois, if his conduct, although performed out of state, causes injury in Illinois provided he could have reasonably anticipated that his conduct could result in injury in Illinois. S. H. A. Ill. ch. 110, §§ 16, 17.

8. Courts 268(4).

As to count alleging grant to plaintiff of exclusive distributorship of Romanian wines, substantial performance by plaintiff in Chicago in furtherance of distributorship, willful termination of distributorship by defendants and, alternatively, a conspiracy among certain defendants to deprive plaintiff of distributorship, a meeting in Chicago in furtherance of conspiracy and exclusion of plaintiff from Chicago market, defendants had submitted to jurisdiction of Illinois courts and were amenable to suit in Illinois district under Illinois longarm statute by reason of transaction of business and commission of tortious acts in Illinois. Fed. Rules Civ. Proc. rule 4(e), 28 U. S. C. A.; S. H. A. Ill. ch. 110, §§ 16, 17.

9. Courts 268(4).

Fact that plaintiff was not a resident of forum state of Illinois was immaterial in determining whether defendants were amenable to suit in Illinois district pursuant to Illinois long-arm statute. Fed. Rules Civ. Proc. rule 4(e), 28 U. S. C. A.; S. H. A. Ill. ch. 110, §§ 16, 17.

10. Courts 268(4).

As to claim for damages arising out of failure of defendants, to perform contract to deliver wine to distributor in Ohio or to distributor's customer in Arizona, defendants were not amenable to suit in Illinois district under Illinois long-arm statute, Fed. Rules Civ. Proc. rule 4(e), 28 U. S. C. A.; S. H. A. Ill. ch. 110, §§ 16, 17.

11. Courts 268(4).

Claim for damages arising out of breach of agreement to deliver Romanian wines to Ohio or to Arizona could not be joined with claim for damages arising out of tortious conduct in Illinois regarding wine distributorship so as to fall within jurisdiction of federal court sitting in Illinois under Illinois long-arm statute. S. H. A. Ill. ch. 110, § 17(3).

Kaplan & Kaplan, Chicago, Ill., John R. Vintilla, Cleveland, Ohio, for plaintiff.

Nicolae Tanase, Brown, Fox & Blumberg, Jacob L. Fox, Eugene L. Resnick, Chicago, Ill., Charles R. Hancock and Otto L. Yelton, Jr., Dickinson, Tex., for defendants.

MEMORANDUM OPINION.

MARSHALL, *District Judge.*

By an amended complaint that is anything but the short and plain statement contemplated by Fed. R. Civ. P. 8(a), plaintiff, Rovin Sales Company, an Ohio corporation, sues defendants, The Socialist Republic of Romania, a foreign state; its Ministry of Foreign Trade; Vinexport, an enterprise owned by Romania and created for the purpose of selling and exporting Romanian wines; Vasile Lapadatu, the Director General of Vinexport; Corneliu Bogdan, Romania's Ambassador to the United States; Napoleon Fodor, Romania's Chief Commercial Counselor in the United States; Octavian Ichim, the representative of Romania's Ministry of Agriculture in the United States, and Teodor Munteanu, the Economic Counsel of the Romanian Trade Promotion Office in Chicago, Illinois, for damages arising out of defendants' alleged failure to honor and their conspiracy to destroy plaintiff's alleged exclusive distributorship of Romanian wines in the United States. While the complaint has been drawn by counsel, it is akin to the *pro se* pleading considered in *Dioguardi* v. *Durning*, 139 F. 2d 774 (2d Cir. 1944) and presumably is entitled to the same generous construction. *Haines* v. *Kerner*, 404 U. S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972); *Conley* v. *Gibson*, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). "Nevertheless, we look askance at its hyperbole and obviously *interrorem* prayer for $75,000,000 in damages and we remind counsel of their responsibilities under Rule 11, Fed. R. Civ. P., and the cost consequences contemplated by 28 U. S. C. § 1331(a) (1970)."

All that is presently pending is the motion of all defendants, except Munteanu, to quash service of summons and dismiss the action "on the grounds that this court lacks jurisdiction over the persons of these defendants and the subject matter of the amended complaint." Defendants' Motion to Quash Service

or Dismiss. We assume that Munteanu was advisedly omitted from the motion because he is present in the Northern District of Illinois. But advised or inadvertent, his failure to move to dismiss is of no consequence because of the conclusions we reach as to the threshold jurisdictional questions as to all defendants.

As noted, this is an amended complaint. The original complaint was against Vinexport alone and service was purportedly made on Munteanu as the agent of Vinexport present in this district. A challenge to that service was earlier sustained on the basis of Munteanu's uncontroverted affidavit that he had no connection with Vinexport. Tr. Pro. 12/11/74, p. 10. Plaintiff was granted the opportunity to plead over for the purpose of alleging facts sufficient to warrant the exercise of so-called long arm jurisdiction under Rule 4(e), Fed. R. Civ. P., and Sections 16 and 17 of the Illinois Civil Practice Act, Ill. Rev. Stat., 1973, ch. 110, §§ 16, 17.

The sufficiency of the amended complaint is not before us, All that has been raised to date is subject matter and *in personam* jurisdiction. But because the jurisdictional reach of Section 17 of the Illinois Civil Practice Act is directed to "cause[s] of action" arising in material part out of the performance of certain enumerated types of conduct in Illinois, some appraisal of the contents of the amended complaint is required. However, the pleading requirements of Section 31 of the Illinois Civil Practice Act—that the pleader allege "substantial averments of fact necessary to state any cause of action either at law or in equity," Ill. Rev. Stat. 1973, ch. 110, § 31 —are not applicable here merely because Rule 4(e) embraces the methods and circumstances under which extraterritorial service of process may be effected in Illinois. A federal court must apply federal standards of pleading under Rule 8(a). Therefore, our inquiry here is not whether plaintiff has pleaded a cause of action which has arisen in part from conduct performed by the defendants in Illinois, but whether, under the

amended complaint, plaintiff would be permitted to "prove [a] set of facts in support of [its] claim which would entitle [it] to relief," (*Conley* v. *Gibson, supra,* at 45-46, 78 S. Ct. at 102) and whether that set of facts can be said to involve, in material part, the performance of acts by the defendants in Illinois.

Applying this standard to Count I of the amended complaint, under its fair intendments plaintiff would be permitted to prove that the manufacture, sale and export of wine in Romania is a state enterprise conducted exclusively through agencies of the State of Romania. In 1968 plaintiff was organized for the purpose of marketing Romanian wines in the United States. Sometime during the period 1968 through late 1972 plaintiff was appointed the exclusive agent for the importation and sale of Romanian wines in the United States by the defendant State of Romania, acting through various agents including Fructexport and Romagricola, which were the predecessors of defendant, Vinexport. Vinexport was organized by the State of Romania in November 1972 as a state owned enterprise for the purpose of exporting and selling Romanian wines to and in the United States.

During the period 1968-1972 plaintiff successfully promoted Romanian wines in the United States creating markets where none had theretofore existed. In 1972 it sold 3000 cases of wine, worth $22,000, in Chicago, Illinois and its environs. It incurred promotional and labeling expenses in the amount of $11,000 at defendants' request. Throughout this period it was promised by agents of the State of Romania that it would not be replaced as the exclusive agent for Romanian wines in the United States, that no other person would be permitted to import Romanian wine into the United States and that the parties would join their interests in a "mixed company . . . having as its purpose . . . a single legal entity which would engage exclusively in the sale of the wines and alcoholic beverages of Romania in the United States, and that plaintiff's

exclusive right in this respect [would] be vested . . . in the mixed company." Amended Complaint, ¶ 13.

In late 1972 or early 1973 defendant State of Romania, through its several defendant agents and contrary to plaintiff's exclusive distributorship, purportedly granted the exclusive right to sell all Romanian beverages in the United States to Beverage Importation Corporation of League City, Texas.

Plaintiff avers that the Romanian state's decision to terminate plaintiff as the exclusive agent for Romanian wines in the United States was the result of a conspiracy among defendants Bogdan, Lapadatu, Fodor and Munteanu, the object of which was to "eliminate" plaintiff and pursuant to which the conspirators "maliciously persuaded the appropriate authorities in Romania to grant the exclusive right [to sell] . . . to Beverage Importation Corporation. . . ." Amended Complaint, ¶ 22.

As for acts performed by the defendants in Illinois, plaintiff asserts in an uncontroverted affidavit by John R. Vintilla,[1] that in June 1971 defendant Bogdan organized and arranged a trade seminar in Chicago at which Bogdan was the principal speaker. At defendant's request, Vintilla attended and participated in the seminar as plaintiff's representative and plaintiff provided the wines that were served to the participants.

The Vintilla affidavit proceeds to state that in February 1972 defendant Lapadatu met with defendant Munteanu in Chicago and informed Munteanu of the recently established arrangements with Beverage Importation Corporation and that "plaintiff could no longer sell [Romanian] wines in Chicago and the midwest. . . ." Vintilla Affidavit, ¶ 13.

The merits of plaintiff's claim on the totality of the facts to be adduced are not before us. Thus, defendants' oblique asser-

1. Mr. Vintilla appears here as counsel for plaintiff. We infer from various papers on file that he is one of the principals in plaintiff. We remind him that he cannot persist in his role as counsel and testify to any controverted matters should the case be tried. American Bar Association's Code of Professional Responsibility, Disciplinary Rules 5-10(B), 5-102; Ethical Considerations 5-9, 5-10.

tion in their papers to an absence of consideration supporting plaintiff's alleged exclusive distributorship, defendants' assertion that the agreement is unenforceable in Illinois because plaintiff is not authorized to import or sell liquor in Illinois, and our own observation that portions of Count I sound in terms of an anticipated agency which never materialized, are not now germane. Those matters go to the merits of plaintiff's claim under Count I to which defendants have not yet responded because, as they assert, they cannot be compelled to.

Count II is much simpler and better pleaded. It alleges a contract under which defendant Vinexport agreed to deliver 900 cases of wine to plaintiff and 500 cases to plaintiff's customer, Arizona Distributing Company of Phoenix, Arizona. Presumably the deliveries were to be made to plaintiff either at its home office in Cleveland, Ohio or in Arizona, and the plaintiff's customer in Arizona. The count also alleges the expenditure of funds by plaintiff to promote the Arizona market. Plaintiff was damaged when Vinexport failed to perform.

Subject matter jurisdiction is no problem. The controversy is between a citizen of Ohio and a foreign state and agencies and citizens thereof and the amount in controversy exceeds $10,000 exclusive of interest and costs. 28 U. S. C. § 1332(a)(2).

Nor are the defendants, the Socialist Republic of Romania, and its several agents and agencies, immune from suit in a court of the United States. On the motion to quash the original service of process on Munteanu, as agent of Vinexport, we held in an unreported oral opinion that where a foreign sovereign engages in commercial as opposed to political or governmental activities, it is not immune from suit on its contracts. *Victory Transports Inc.* v. *Comisaria General, etc.*, 336 F. 2d 354 (2d Cir. 1964). *See Purdy Co.* v. *Argentina*, 333 F. 2d 95 (7th Cir. 1964); Annot., Foreign Sovereign-Immunity from Suit," 25 A. L. R. 3d 322 (1969). This jurisdictional holding in no

way, however, prejudges the question of the ultimate liability of Romania for the acts of Vinexport and its predecessors. It is based on the plaintiff's allegation that Vinexport and its predecessors are and were the alter ego of the State of Romania.

What is left then is the amenability of the defendants to suit in this district under the Illinois long arm statute.

As we have seen, Count I purports to allege, *inter alia*, that plaintiff was granted an exclusive distributorship of Romanian wines by defendants which embraced Chicago, a promotional meeting conducted in Chicago jointly by an agent of defendant Romania and plaintiff, substantial performance by plaintiff in Chicago in furtherance of the distributorship, the wrongful termination of the distributorship by the defendants and, alternatively, as the result of a conspiracy among certain defendants maliciously to deprive plaintiff of the distributorship, a meeting in Chicago between two of the defendants in furtherance of the conspiracy, and the exclusion of plaintiff from the Chicago market.

The Illinois long arm statute was intended to extend jurisdiction to the maximum reach permissible under due process of law. *Nelson* v. *Miller*, 11 Ill. 2d 378, 143 N. E. 2d 673 (1957). Due process of law, however, requires that a defendant have minimal contacts with the forum in which jurisdiction is asserted. *International Shoe Co.* v. *Washington*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Section 17 of the Illinois Civil Practice Act as made applicable here by Rule 4(e), authorizes the exercise of jurisdiction over defendants in respect to claims arising out of the transaction of business or the commission of a tortious act in Illinois. A defendant is deemed to commit a tortious act in Illinois if his conduct, although performed out of state, causes injury here, provided he could have reasonably anticipated that his conduct could result in injury here. *Gray* v. *American Radiator Co.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961).

We conclude that insofar as Count I is concerned, defendants have submitted to the jurisdiction of Illinois' courts and hence to this court by way of their transaction of business here and the commission or tortious acts here. *Fisons Limited* v. *United States*, 458 F. 2d 1241 (7th Cir. 1972), *cert. denied*, 405 U. S. 1041, 92 S. Ct. 1312, 31 L. Ed. 2d 581 (1972); *Consolidated Laboratories* v. *Shandon*, 384 F. 2d 797 (7th Cir. 1967); *Jack O'Donnell Chevrolet Inc.* v. *Shankles*, 276 F. Supp. 998 (N. D. Ill. 1967). Of course, the fact that plaintiff is not a resident of the forum state is immaterial. *Scoville Mfg. Co.* v. *Dateline Electric Co.*, 461 F. 2d 897, 900 (7th Cir. 1972).

The same is not true of Count II, however. There plaintiff alleges an individual transaction in respect to which there was no Illinois conduct or contact and none was anticipated. While it may be that the claim there asserted will be subsumed by the claim under Count I, it cannot stand alone. Section 17(3) of the Illinois Civil Practice Act which we must follow does not permit the joinder of a claim which is wanting in personal jurisdictional facts with one which is supported by those facts. Ill. Rev. Stat. 1973, ch. 110, § 17(3).

For the foregoing reasons the motion to quash service and dismiss is denied as to Count I and granted as to Count II of plaintiff's amended complaint; defendants are ordered to answer Count I within 20 days; Count II is dismissed. Cause set for report on status October 23, 1975 at 10:00 a.m.

APPENDIX B.

No. 75/10312

UNITED STATES OF AMERICA,
Department of State.

AND TO WHOM THESE PRESENTS SHALL COME, GREETING:

This to to certify that Mr. Hampton Davis, whose name is subscribed to the document hereunto annexed, was at the time of subscribing the same Assistant Chief of Protocol, Department of State, United States of America, and that full faith and credit are due to his acts as such.

In testimony whereof, I, Robert S. Ingersoll, Acting Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this first day of December, 1975.

/s/ ROBERT S. INGERSOLL,
Acting Secretary of State,

/s/ FRANCIS J. FILLIUS,
Authentification Office,
Department of State.

TO WHOM IT MAY CONCERN:

This is to certify that I, Hampton Davis, Assistant Chief of Protocol of the United States Department of State, am responsible for registering and maintaining the official records of diplomatic and consular officers and other employees of foreign governments in the United States and its territories.

The official records of the Department of State indicate that His Excellency Corneliu Bogdan is and has, since July 27, 1967, been the duly appointed Ambassador Extraordinary and Plenipotentiary of the Socialist Republic of Romania to the United States. In that capacity he enjoys full diplomatic immunity from judicial process under the provisions of Sections 252-254 of Title 22 of the United States Code.

/s/ HAMPTON DAVIS,
Hampton Davis,
Assistant Chief of Protocol.

Department of State,
Washington, December 1, 1975.

TO WHOM IT MAY CONCERN:

This is to certify that I, Hampton Davis, Assistant Chief of Protocol of the United States Department of State, am responsible for registering and maintaining the official records of diplomatic and consular officers and other employees of foreign governments in the United States and its territories.

The official records of the Department of State indicate that Mr. Napoleon Fodor has been duly notified to the Department of State since November 9, 1971, as an Economic Counselor to the Diplomatic Mission to the United States of America from the Socialist Republic of Romania; and is entitled to full diplo-

matic immunity under the provisions of Sections 252-254 of Title 22 of the United States Code.

/s/ HAMPTON DAVIS,
Hampton Davis,
Assistant Chief of Protocol.

Department of State,
Washington, December 1, 1975.

GROUP EXHIBIT B.

No. 75/10312-1

UNITED STATES OF AMERICA,
Department of State.

AND TO WHOM THESE PRESENTS SHALL COME, GREETING:

This is to certify that Mr. Hampton Davis, whose name is subscribed to the document hereunto annexed, was at the time of subscribing the same Assistant Chief of Protocol, Department of State, United States of America, and that full faith and credit are due to his acts as such.

In testimony whereof, I, Robert S. Ingersoll, Acting Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this first day of December, 1975.

/s/ ROBERT S. INGERSOLL,
Acting Secretary of State,

/s/ FRANCIS J. FILLIUS,
Authentication Officer, Department of State.

APPENDIX C.

Excerpts from Vienna Convention on Diplomatic Relations

ARTICLE 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

ARTICLE 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.

ARTICLE 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(*a*) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission:

(*b*) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(*c*) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.